

MAR 17 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6080

DATE RECEIVED: September 26, 2008

DATE ACTIVATED: December 17, 2008

EXPIRATION OF SOL: June 1, 2013

COMPLAINANT: Council on American Islamic Relations

RESPONDENTS: The Clarion Fund, Inc.
Aish HaTorah International

RELEVANT STATUTES: 2 U.S.C. § 441b(a)
2 U.S.C. § 434(f)
2 U.S.C. § 441e
11 C.F.R. § 100.16
11 C.F.R. § 109.10
11 C.F.R. § 110.20

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter concerns The Clarion Fund, Inc. ("Clarion"), a 501(c)(3) tax-exempt organization that distributed approximately 28 million DVD copies of **OBSESSION: RADICAL ISLAM'S WAR AGAINST THE WEST (2006)** ("OBSESSION"), a film about radical Islam, through paid newspaper inserts shortly before the 2008 general election. Although the film does not mention any federal candidate by name, Complainant alleges that Clarion produced and distributed the DVD to encourage the election of Republican presidential candidate John McCain. *See* MUR 6080 Complaint. The complaint also alleges that Clarion, because of its close ties to an Israeli-based not-

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1 for-profit corporation, Aish HaTorah International, may have used contributions from
2 foreign nationals to fund distribution of the film.

3 Clarion responds that because the film content itself does not identify a specific
4 federal candidate, it is not a prohibited independent expenditure or electioneering
5 communication. *See* MUR 6080 Response. Having denied any nexus to an election,
6 Clarion does not address whether foreign nationals provided funds to distribute the film.

7 Because the film does not contain express advocacy and is not an electioneering
8 communication, we recommend the Commission find no reason to believe that
9 Respondents violated the Federal Election Campaign Act of 1971, as amended ("the
10 Act"). Given that funds provided to produce and distribute the film were not used for
11 either an independent expenditure or an electioneering communication, we recommend
12 that the Commission find no reason to believe that Respondents made or received
13 prohibited contributions from foreign nationals.

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 **A. The Clarion Fund and OBSESSION**

16 In November 2006, Clarion incorporated as a 501(c)(3) tax-exempt organization
17 in Delaware. *See* <http://www.clarionfund.org>. Clarion's officers include: Robert Shore
18 (Rabbi Raphael), Rabbi Henry Harris, and Rebecca Kabat. Clarion's website describes
19 the organization as a "non-profit, non-partisan organization whose mission is to educate
20 Americans about issues of national security" through "film production and distribution,
21 online education, and college outreach." *Id.* While Clarion's website includes
22 information about and links to the film, it does not include any other organizational
23 information about Clarion or about the producers of OBSESSION and provides only phone

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1 numbers and generic email addresses for additional information, press inquiries, or
2 screening requests.

3 OBSESSION was produced in 2005 and first released in 2006. See MUR 6080
4 Response. The hour long film, which makes no references to any candidates for federal
5 office, includes graphic images of terrorism, footage of Middle Eastern news programs
6 that advocates anti-American and anti-Western views and violence, and compares the
7 threat of radical Islam to Nazi Germany. The film credits list Shore, who is Canadian, as
8 a producer. See OBSESSION. Shore is also a former director of Aish HaTorah
9 International, an Israeli-based organization that shares a New York City mailing address
10 with Clarion. See Haaretz.com, *'Obsession' Stokes Passions, Fears and Controversy*,
11 <http://www.haaretz.com/hasen/spages/873843.html> (last visited December 18, 2008); see
12 also Inter Press Service News Agency, *Politics: Neo-cons, Ex-Israeli Diplomats Push*
13 *Islamophobic Video* (Sept. 24, 2008) available at [http://ipsnews.net/](http://ipsnews.net/print.asp?idnews=43983)
14 [print.asp?idnews=43983](http://ipsnews.net/print.asp?idnews=43983) (last visited Dec. 19, 2008). Another Canadian, operating under
15 the alias Peter Micr (whose true identity remains unknown), reportedly provided about 80
16 percent of the film's budget and is the executive producer of the film. See Haaretz.com,
17 *supra*. Clarion requests viewers to register for screenings of the film on the website of
18 Aish HaTorah, the Israeli-based non-profit mentioned above. See *id.*

19 In September 2008, Clarion distributed the film to over 70 newspapers located in
20 14 states that were regarded as "swing" or "battleground" states in the upcoming
21 presidential election. *The Secret Money Project: Charity Floods Swing States With Anti-*
22 *Islam DVD* (NPR radio broadcast Sept. 26, 2008) available at <http://www.npr.org/>

1 templates/story/story.php?storyId=95076174 (last visited December 19, 2008). At the
2 time of the distribution, Clarion's website reportedly included an endorsement, since
3 removed, of then-Republican presidential candidate John McCain. See Gary Dwight
4 Miller, *DVD on Radical Islam Offends Lemoyne Recipient*, THE PATRIOT NEWS, Sept. 11,
5 2008, at A01. The website endorsement reportedly discussed Democratic presidential
6 candidate Barack Obama and concluded, "'McCain's policies seek to confront radical
7 Islamic extremism and terrorism and roll it back while Obama's, although intending to do
8 the same, could in fact make the situation facing the West even worse.'" *Id.* (quoting
9 Clarion's since-removed endorsement). When the question of whether a 501(c)(3)
10 organization should be making political endorsements was brought to their attention,
11 Clarion acknowledged the statement "'crossed the line' into an endorsement of sorts" and
12 agreed to take the statement off its website *Id.*

13 **B. Analysis**

14 **1. Independent Expenditures**

15 The Act prohibits any corporation from making a "contribution or expenditure in
16 connection with any election to any political office." 2 U.S.C. § 441h(a); 11 C.F.R. §
17 114.2(a). An independent expenditure is "an expenditure by a person expressly
18 advocating the election or defeat of a clearly identified candidate" and "that is not made
19 in concert or cooperation with or at the request or suggestion of such candidate, the
20 candidate's authorized political committee, or their agents, or a political party committee
21 or its agents." 2 U.S.C. § 431(17)(A), (B); 11 C.F.R. § 100.16. A person (including a
22 political committee) who makes an independent expenditure aggregating \$10,000 or
23 more at any time up to the twentieth day before the date of an election is required to file a

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report describing the expenditure with the Commission within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R. § 109.10(c).

Clarion's distribution of OBSESSION does not constitute an independent expenditure because the film does not clearly identify any federal candidate, much less contain express advocacy comparable to the illustrative phrases set forth in the Commission's implementing regulations at 11 C.F.R. § 100.22(a) or 100.22(b). The complaint in the present matter fails to identify any specific instance in OBSESSION that clearly identifies a federal candidate or advocates for the election or defeat of such a candidate. In a previous matter involving the production and distribution of the documentary film, FAHRENHEIT 9/11, the Commission found no reason to believe that expenditures associated with the film constituted independent expenditures because the film did not expressly advocate the "election or defeat of a clearly identified candidate." See First General Counsel's Report ("FGCR") in MURs 5475 (Dog Eat Dog Films, Inc.) and 5539 (FAHRENHEIT 9/11) at 17. By comparison, OBSESSION both fails to identify a federal candidate and lacks express advocacy. Thus, its distribution does not constitute an independent expenditure.

With regard to the endorsement on Clarion's website, the Commission's regulations permit a corporation to publicly announce its endorsement of a candidate so long as disbursements for the public announcement remain *de minimis*. 11 C.F.R. § 114.4(c)(6). The available information suggests that Clarion did not make more than a *de minimis* disbursement in posting its endorsement. However, restrictions under the Internal Revenue Code prohibited Clarion, a 501(c)(3) tax-exempt organization, from posting a statement on its website in support of John McCain, which it later removed.

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1 See 11 C.F.R. § 114.4(c)(6) (advising that "The Internal Revenue Code and regulations . .
2 . should be consulted regarding restrictions or prohibitions on endorsements by nonprofit
3 corporations described in 26 U.S.C. 501(c)(3)."). Clarion's website endorsement of
4 McCain, wholly separate from the film, does not appear to affect the analysis of whether
5 the distribution of OBSESSION constituted an independent expenditure. Further, any
6 violation of Clarion's § 501(c)(3) status would appear to be the concern of the IRS and
7 not this agency's.

8 2. Electioneering Communications

9 The complaint also alleges the film is a prohibited corporate electioneering
10 communication but fails to explain that assertion. Under 11 C.F.R. § 100.29(a), an
11 "electioneering communication" is defined to include any broadcast, cable, or satellite
12 communication that refers to a clearly identified candidate for Federal office; is publicly
13 distributed within 30 days before a primary election; and is targeted to the relevant
14 electorate in the case of a candidate for the House of Representatives.¹ "A clearly
15 identified candidate . . . means that the candidate's name, nickname, photograph, or
16 drawing appears, or the identity of the candidate is otherwise apparent through an
17 unambiguous reference . . ." 11 C.F.R. § 100.29(b)(2). A broadcast, cable, or satellite
18 communication "means a communication that is publicly distributed by a television
19 station, radio station, cable television system, or satellite system." 11 C.F.R. §

¹ Although the Act prohibits the use of corporate funds for electioneering communications, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, ___, 127 S. Ct. 2652, 2667 (2007) (*WRTL*), the Supreme Court limited the ban against corporate funding of electioneering communications to ads that are the "functional equivalent of express advocacy" in that they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* The Commission subsequently incorporated the principles of the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R. § 114.15. See Final Rule on Electioneering Communications, 72 Fed. Reg. 72,899, 72,914 (Dec. 26, 2007).

1 100.29(b)(1). "[P]ublicly distributed" means "aired, broadcast, cablecast or otherwise
2 disseminated through the facilities of a television station, radio station, cable television
3 system, or satellite system." 11 C.F.R. § 100.29(b)(3)(i).

4 The film is not an electioneering communication because (1) it does not mention
5 or clearly identify a federal candidate and (2) the film does not appear to meet the
6 regulatory definitions of a "broadcast, cable, or satellite communication" because Clarion
7 mailed the film for the private viewing of the recipient. Accordingly, the film is not a
8 prohibited electioneering communication.

9 **3. Contributions by Foreign Nationals**

10 It is unlawful for a foreign national, directly or indirectly, to make a contribution
11 or donation of money or other thing of value in connection with a Federal, State, or local
12 election, or to a committee of a political party. 2 U.S.C. § 441c(a)(1)(A), (B); 11 C.F.R.
13 § 110.20(b). A "foreign national" is an individual who is not a citizen of the United
14 States or a national of the United States and who is not lawfully admitted for permanent
15 residence. 2 U.S.C. § 441c(b)(2). The term likewise encompasses "a partnership,
16 association, corporation, organization, or other combination of persons organized under
17 the laws of or having its principal place of business in a foreign country." 2 U.S.C. §
18 441c(b)(1) (citing 22 U.S.C. § 611(b)(3)). Additionally, a foreign national may not
19 directly or indirectly make an expenditure, an independent expenditure, or a disbursement
20 in connection with a Federal, State, or local election. 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R.
21 § 110.20(f). Likewise, Commission regulations prohibit foreign nationals from directing,
22 dictating, controlling, or directly or indirectly participating in the decision-making
23 process of any person, such as a corporation, with regard to such person's federal or

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1 nonfederal election-related activities, including decisions concerning the making of
2 contributions, donations, expenditures, or disbursements in connection with elections for
3 any Federal, State, or local office. 11 C.F.R. § 110.20(i).

4 Complainant asserts that "the funding for the production, marketing and
5 distribution of 'Obsession' may have originated from Israeli-based Aish HaTorah
6 International." See MUR 6080 Complaint. The basis of the allegation is that the
7 individuals who incorporated Clarion "are reported to serve as employees of Aish
8 HaTorah" and that Clarion shares a mailing address with Aish HaTorah. *Id.* The
9 complaint again relies on media reports that viewers registered for screenings on Aish
10 HaTorah's Website. *Id.* Nevertheless, because the film distribution did not constitute an
11 independent expenditure or electioneering communication, the prohibition against foreign
12 nationals making expenditures does not apply.

13 **C. Conclusion**

14 Based on the above, sufficient information does not exist for the Commission to
15 conclude that Clarion's distribution of the film constitutes an independent expenditure
16 because the film does not contain express advocacy or constitute an electioneering
17 communication. Therefore, we recommend the Commission find no reason to believe
18 that The Clarion Fund, Inc. and Aish HaTorah International violated 2 U.S.C. § 441b.
19 Further, we recommend the Commission find no reason to believe that Aish HaTorah or
20 The Clarion Fund, Inc. violated 2 U.S.C. § 441e by making or receiving prohibited
21 contributions from foreign nationals.

22 **III. RECOMMENDATIONS**

- 23 1. Find no reason to believe that The Clarion Fund, Inc. violated 2 U.S.C. §§
24 441b(a) and 441e.

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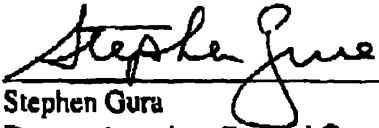
2. Find no reason to believe that Aish HaTorah International violated 2 U.S.C. §§ 441b(a) or 441c.
3. Approve the attached Factual and Legal Analysis.
4. Approve the appropriate letters.
5. Close the file.

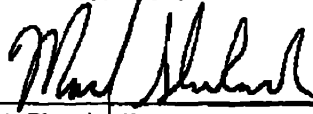
Thomasenia P. Duncan
General Counsel

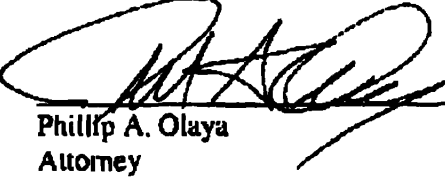
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